

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TITUS DION PETERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. C16-5160 BHS
CR11-5566-BHS

ORDER DENYING PETITION

This matter comes before the Court on Titus Dion Peterson's ("Petitioner") 28 U.S.C. § 2255 petition. Dkt. 1. Also before the Court is the Government's unopposed motion to seal. Dkt. 11. The Court has considered the pleadings filed in support of and in opposition to the petition and the remainder of the file and hereby denies the petition for the reasons stated herein.

I. BACKGROUND

On November 2, 2011, the United States of America (the "Government") arrested Petitioner on charges of various drug trafficking and firearms offenses. CR11-5566, Dkts. 1–3. On December 9, 2011, Peterson was arraigned on an indictment. *Id.*, Dkt. 29. On

1 September 13, 2012, Peterson was arraigned on a superseding indictment on the
2 following eight counts:

3 **Count 1:** Conspiracy to Distribute Cocaine Base in violation of 21 U.S.C.
§§ 841(a)(1) and 846;

4 **Counts 2 and 3:** Possession of Cocaine Base with Intent to Distribute, in
5 violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C), and 18 U.S.C. § 2;

6 **Count 4:** Possession of Cocaine Base with Intent to Distribute, in violation
of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2;

7 **Count 5:** Possession of Cocaine Base with Intent to Distribute, in violation
8 of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C);

9 **Count 6:** Possession of a Firearm in Furtherance of Drug Trafficking in
violation of 18 U.S.C. § 924(c)(1)(A);

10 **Count 7:** Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922
(g)(1) and 924 (e)(1); and

11 **Count 8:** Witness Tampering, in violation of 18 U.S.C. § 1512 (b)(1) and
12 1512 (b)(3).

13 *Id.*, Dkts. 112, 128.

14 On September 7, 2012, Petitioner's counsel filed three suppression motions. *Id.*,
15 Dkts. 116–118. On September 21, 2012, the Court considered all three motions in a
16 combined hearing, Petitioner waived his right to testify, and the Court denied the
17 motions. *Id.*, Dkt. 143. At that hearing, the Court also conducted a *Faretta* inquiry
18 regarding Petitioner's statements that he wished to proceed *pro se*, but Petitioner stated
19 that he wished to remain represented. *Id.*, Dkt. 192. The same day, the Government filed
20 enhanced penalty information. *Id.*, Dkt. 145.

21 On September 24, 2012, after numerous appointments and withdrawals of counsel,
22 Petitioner moved to proceed *pro se*. *Id.*, Dkt. 146. On September 25, 2012, the Court

1 allowed Petitioner to proceed *pro se* after he assaulted his counsel and his counsel moved
2 to withdraw; but the Court still appointed Petitioner's seventh and final counsel as
3 standby counsel for the bench trial. *Id.*, Dkts. 150.

4 On October 3, 2012, Petitioner's bench trial began and Petitioner filed another
5 suppression motion and moved for reconsideration on the previously denied suppression
6 motions. *Id.*, Dkts. 156–161. The Court denied Petitioner's suppression motion and his
7 motions for reconsideration. *Id.*, Dkt. 161. Petitioner's stepfather, Dennis Perkins,
8 previously pled guilty and testified as a witness for the Government. *Id.*, Dkt. 162. On
9 October 5, 2012, the trial ended and Petitioner was convicted on all eight counts. *Id.*, Dkt.
10 163.

11 On June 3, 2016, the Court sentenced Petitioner to a total of 240 months of
12 incarceration followed by eight years supervised release. *Id.*, Dkts. 209, 210. Petitioner's
13 sentence included a mandatory minimum of 180 months pursuant to the Armed Career
14 Criminal Act ("ACCA"), 18 U.S.C. §§ 922(g)(1) and 924(e)(1). *Id.*, Dkt. 210 at 2.
15 Petitioner's sentence also included a mandatory consecutive minimum sentence of 60
16 months pursuant to 18 U.S.C. § 924(c)(1). *Id.*

17 On June 3, 2016, Petitioner appealed his conviction on the basis that the Court
18 unlawfully denied his suppression motion. *Id.*, Dkt. 211. On December 11, 2014, the
19 Court of Appeals for the Ninth Circuit affirmed this Court's decision to deny suppression.
20 *Id.*, Dkt. 229.

21 On February 29, 2016, Petitioner filed the present 28 U.S.C. § 2255 petition to
22 vacate, set aside, or correct his sentence. Dkt. 1.

II. DISCUSSION

A. Ground One

Petitioner argues in his first ground for relief that his total 240-month sentence is incorrect. Specifically, he argues that (1) his sentence should be reduced pursuant to *Johnson*, and (2) the Court erred at sentencing when setting forth the applicable range under the sentencing guidelines.

1. *Johnson* Argument

Petitioner's invocation of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), does not qualify him for resentencing. While Petitioner's prior convictions for Assault, Attempted Eluding, and Robbery may no longer qualify as predicate violent offenses under the residual clause of the ACCA, he has nonetheless been convicted of three predicate drug trafficking offenses. Dkt. 12. Accordingly, *Johnson* does not entitle Petitioner to a new sentencing.

The Court notes that the predicate trafficking offense from 1996 was absent from the 21 U.S.C. § 851 enhancement information filed by the Government prior to trial. That previous conviction was not presented to the Court until the presentencing report. Nonetheless, it was appropriate for the Court to consider Petitioner's recidivism for the purposes of the ACCA enhancement at sentencing, including his 1996 drug trafficking conviction, although it was not presented at trial. *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (holding that, in the context of sentence enhancements, recidivism need not be treated as an element of an offense); *see also United States v. Covian-Sandoval*, 462 F.3d 1090, 1097 (9th Cir. 2006) ("The fact of a prior conviction is

1 the *only* fact that both increases a penalty beyond the statutory maximum and can be
2 found by a sentencing court.”). In light of Petitioner’s three predicate drug trafficking
3 offenses, imposing a sentence under the ACCA was not in error.

4 **2. Guidelines Calculation**

5 Petitioner argues that his 240-month sentence is in error because “[t]he Court’s
6 sentencing calculation totaled 25 and level 6 . . . which puts [him] in the sentencing range
7 of 110–137 months.” Dkt. 1 at 4. However, this argument fails to account for the
8 application of the ACCA or 18 U.S.C. § 924(c). Under the ACCA and § 924(c),
9 Petitioner received no more than the mandatory consecutive minimum sentences. This
10 total sentence of 240 months actually fell below the sentencing range set forth in USSG §
11 4B1.1(c)(3), applicable to Petitioner, of 360 months to life. Additionally, the Court
12 explained its downward departure at sentencing by stating that the mandatory minimum
13 was a sufficient sentence, but no longer than necessary, to achieve the purpose of
14 imposing incarceration. *See* CR 11-5566, Dkt. 219 at 31–32. This explanation was
15 adequate under the law. 18 U.S.C. 3553(a); *United States v. Booker*, 543 U.S. 220 (2005).
16 Accordingly, the Court finds it did not err in the guidelines calculation used at
17 sentencing.

18 **B. Ground Two**

19 In his second ground, Petitioner claims several due process deprivations. Petitioner
20 argues that (1) he was deprived of adequate time to enter a proposed plea agreement with
21 the State of Washington, (2) the Government lacked probable cause to search for guns
22

1 recovered from Dennis Perkins's storage unit, and (3) the Government failed to disclose
2 the failed drug tests of a key witness, Dennis Perkins.

3 **1. Cancelled Plea Bargain Offer**

4 According to Petitioner, the Government deprived him of the opportunity to accept
5 a plea agreement with the State of Washington by "threatening" him on October 26,
6 2011, that if he didn't "take the state deal by Oct. 28, 2011 a federal warrant would be
7 issued." Dkt. 1 at 5. Petitioner contends that he had verbally accepted the state deal and
8 was scheduled to enter a plea on October 31, 2001, but the federal warrant was issued on
9 October 28, 2001, wrongfully depriving him of the opportunity to enter the state plea
10 agreement. *Id.*

11 First, the Court notes that W.D. Wash. Local Rules CrR 11(c)(1) provides:
12 "Without court approval, plea agreements in felony cases shall be in writing and signed
13 by the defendant, the defendant's attorney and the attorney for the government."

14 Accordingly, Plaintiff's alleged *verbal* acceptance of a plea agreement offered by
15 Washington State does not suggest the existence of a plea agreement that would have
16 been enforceable before this Court on Plaintiff's federal charges.

17 Moreover, Plaintiff provides no authority, and the Court can find none, to suggest
18 that a defendant has a right to specific performance of a plea agreement that was never
19 formally accepted or entered. To the contrary, the Supreme Court has even stated that,
20 depending on the applicable jurisdiction's law, "it appears the prosecution has some
21 discretion to cancel a plea agreement to which the defendant has agreed." *Missouri v.*
22 *Frye*, 132 S. Ct. 1399, 1410 (2012).

1 Washington law states that that the prosecutorial standards in plea agreement
2 negotiations set forth in RCW 9.94A “are not intended to, do not and may not be relied
3 upon to create a right or benefit, substantive or procedural, enforceable at law.” RCW
4 9.94A.401. Accordingly, the Court finds that Petitioner cannot assert a substantive right
5 to enforce a state plea negotiation that never resulted in a formal agreement approved by
6 a state court pursuant RCW 9.94A.431.

7 Petitioner does have a right to effective assistance of counsel during plea
8 negotiations, but Petitioner does not argue that his counsel was ineffective for failing to
9 formalize and enter a plea agreement in state court prior to October 28, 2011. Even if
10 Petitioner had pursued such an argument, it would fail. While the federal complaint was
11 sworn out on October 28, 2011, Petitioner was not arrested until November 2, 2011.
12 CR11-5566, Dkts. 1, 9. Petitioner alleges that he was scheduled to enter a plea
13 agreement on October 31, 2011. Dkt. 1 at 5. Under such circumstances, Petitioner cannot
14 show that the federal complaint filed on October 28, 2011, prejudiced his ability to enter
15 the state plea agreement as allegedly scheduled on October 31, 2011.

16 **2. Probable Cause for the Search Warrant**

17 Petitioner alleges that the Government lacked probable cause to search for the
18 guns that were found in a storage unit registered to Dennis Perkins because “there was no
19 evidence submitted that guns existed . . . in the [warrant] affidavit. Allegations of drugs
20 in itself is not enough.” Dkt. 1 at 5.

21 The fact that law enforcement were lawfully searching for drugs when they
22 discovered the firearms does not mean that Petitioner can suppress the firearms. When

1 law enforcement discovers firearms while conducting a lawful search, and the
2 incriminating nature of the firearms is readily apparent due to previous drug trafficking
3 convictions, “the seizure of the firearms [i]s justified under the plain view doctrine.”
4 *United States v. Tate*, 133 F. App’x 447, 448 (9th Cir. 2005) (citing *United States v.*
5 *Ewain*, 88 F.3d 689, 693 (9th Cir. 1996)).

6 As the Court found in the suppression hearing on September 25, 2013, *see* CR11-
7 5566, Dkt. 192 at 135–40, and again on Petitioner’s motion for reconsideration, *see id.*,
8 Dkt. 197 at 123–24, the warrant to search the storage facility was based on probable
9 cause. This ruling was affirmed on appeal. *Id.*, Dkt. 229. Because law enforcement
10 lawfully accessed the firearms while executing a valid search warrant and the
11 incriminating nature of the guns was immediately apparent, the seizure of the guns was
12 justified.

13 **3. Drug Tests of Government Witness**

14 Petitioner argues that the Government wrongfully withheld information showing
15 that a Government witness—Dennis Perkins, Petitioner’s codefendant—failed two drug
16 tests while on bond. Dkt. 1 at 5–6. To establish a *Brady* violation in contravention of his
17 due process rights, Petitioner must show: (1) the Government suppressed evidence, (2)
18 the evidence was exculpatory or impeachment evidence favorable to the defendant, and
19 (3) the nondisclosure prejudiced the defense. *Benn v. Lambert*, 283 F.3d 1040, 1052–53
20 (9th Cir. 2002).

21 Petitioner cannot show that the evidence was suppressed or that the alleged
22 nondisclosure would have prejudiced his defense. The pretrial petition and order for

1 warrant, CR11-5566, Dkt. 65, filed in Petitioner's case on April 6, 2012, described the
2 Perkins's violation of his bond conditions. This information was further described in
3 subsequent docket entries. *Id.*, Dkts. 67, 68. "[T]here is no authority for the proposition
4 that the government's *Brady* obligations require it to point the defense to specific
5 documents with[in] a larger mass of material that it has already turned over." *United*
6 *States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997), *cited by Rhoades v. Henry*, 638
7 F.3d 1027, 1055 n.12 (9th Cir. 2011).

8 Moreover, even if the Government had not revealed that Dennis Perkins had
9 violated his bond conditions, the witness's continued use and addiction to narcotics was
10 otherwise made known to Petitioner and highlighted at trial. *Id.*, Dkt. 198 at 86, 91, 104.
11 Also, Perkins's drug use was clearly known to Petitioner because Petitioner was
12 supplying Perkins with drugs. *Id.*, Dkt. 198 at 104. Petitioner cannot show that there was
13 a suppression in violation of *Brady* because he "had all the salient facts regarding the
14 existence of the [evidence] that he claims [was] withheld." *Rhoades v. Henry*, 638 F.3d
15 1027, 1039 (9th Cir. 2011) (quotation omitted). Because Petitioner can show neither
16 suppression nor prejudice, his argument fails.

17 **C. Ground Three**

18 In ground three, Petitioner argues that the Court erred by (1) denying his motion
19 for reconsideration regarding suppression of evidence obtained from the storage unit, (2)
20 finding that the warrant to search the storage unit was based on probable cause, and (3)
21 finding that the "good faith exception" would apply to any misstatements in the warrant
22 affidavit.

Petitioner has not raised any issue that was not addressed at his pretrial suppression hearing or affirmed on appeal. While Petitioner attempts to frame his arguments as separate “procedural errors,” each argument is defeated by a finding that the warrant to search the storage unit was supported by probable cause. As addressed above, the warrant to search the storage facility was based on probable cause. *See* CR11-5566, Dkt. 192 at 135–40; *Id.*, Dkt. 197 at 123–24. The Court of Appeals affirmed this finding. *Id.*, Dkt. 229. Accordingly, Petitioner’s arguments fail. *See United States v. Currie*, 589 F.2d 993, 995 (9th Cir. 1979) (“Issues disposed of on a previous direct appeal are not reviewable in a subsequent § 2255 proceeding . . . that the issue may be stated in different terms is of no significance.”) (internal citations omitted).

D. Ground Four

In ground four, Petitioner argues that he was deprived of constitutional rights when the Government allegedly (1) failed to turn over the audio recording of a March 9, 2010 interview of informant A.S. with police, (2) failed to disclose the benefits Dennis Perkins and informant A.S. gained by testifying against Petitioner or revealing information about him, and (3) allowed Dennis Perkins to testify falsely about his involvement with Petitioner’s drug trafficking.

As stated above, a *Brady* violation requires that (1) the Government suppressed evidence, (2) the evidence was exculpatory or impeachment evidence favorable to the defendant, and (3) the nondisclosure prejudiced the defense. *Benn*, 283 F.3d at 1052–53. However:

1 There is no *Brady* violation where a defendant knew or should have known
2 the essential facts permitting him to take advantage of any exculpatory
information, or where the evidence is available from another source,
because in such cases there is really nothing for the government to disclose.

3 *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) (internal edits and quotations omitted). *See*
4 *also Rhoades*, 638 F.3d at 1039 (no suppression under *Brady* when defendant “had all the
5 salient facts regarding the existence of the [evidence] that he claims [was] withheld.”).

6 Here, all of the information that Petitioner argues was wrongfully suppressed was
7 provided to Petitioner’s defense. Petitioner argues that he did not receive an audio
8 recording of the law enforcement interview of informant A.S., whose statement
9 connected Petitioner’s drug trafficking to Dennis Perkins’s storage unit for the purposes
10 of the warrant affidavit. Dkt. 1 at 8. However, it appears that Petitioner’s defense was
11 indeed provided the tape recorded statement. CR11-5566, Dkt. 190 at 7. Moreover, at the
12 very least, the full content of that interview was provided to Petitioner and his defense in
13 the form of a written transcript. *Id.*, Dkt. 192 at 19–21.

14 Petitioner also claims that the Government suppressed information regarding the
15 benefits that its informant and witness received for testifying against him. Dkt. 1 at 8.
16 However, the Government provided Petitioner with a copy of Dennis Perkins’s plea
17 agreement. CR11-5566, Dkt. 192 at 8–11. Also, in addition to providing Petitioner with
18 *Brady* material regarding informant A.S., including his plea agreement, *see id.*, Dkt. 190
19 at 6–7, 10–11, the warrant affidavit sufficiently set out that the informant was
20 cooperating with law enforcement in hopes of receiving a reduced sentence in his own
21 prosecution. *Id.*, Dkt. 192 at 137–38.
22

Petitioner also contends that the Government knowingly allowed Dennis Perkins to testify falsely about the timing of his involvement with Petitioner's drug trafficking activities in violation of *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959). However, Petitioner makes no specific allegations to support this contention. Where there are allegations of prosecutorial misuse of false testimony, “[t]o earn the right to an evidentiary hearing, a movant is required to allege specific facts which, if true, would entitle him to relief.” *United States v. Zuno-Arce*, 25 F. Supp. 2d 1087, 1118 (C.D. Cal. 1998), *aff’d*, 209 F.3d 1095 (9th Cir. 2000), *and aff’d in part, appeal denied in part*, 339 F.3d 886 (9th Cir. 2003) (citing *Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997); Rule 4(b) of the Rules Governing Section 2255 Proceedings). Petitioner has failed to describe with any specificity either (1) the testimony of Dennis Perkins that he claims was false or (2) facts whereby the Court could draw an inference that the Government knew of such falsity. Accordingly, Petitioner's *Napue* argument fails.

E. Grounds Five and Six

In Ground Five, Petitioner again argues that the search warrant for the storage unit was invalid. In Ground Six, Petitioner argues that he was denied effective assistance of counsel because his counsel (1) failed to prove that the Government was lying in order to establish probable cause for the search warrant; (2) failed to file his “offer of proof” regarding the veracity of interview notes supporting the warrant; (3) untimely filed an additional “offer of proof” regarding a different March 9, 2010 interview that would allegedly disprove the veracity of information supporting the warrant; (4) failed to compel discovery of the audio for the March 9, 2010 interview; (5) failed to show that the

1 good faith exception did not apply to the warrant; (6) relied on the transcribed version of
2 the March 9, 2010 interview rather than the actual audio; and (7) relied on facts contained
3 in the warrant affidavit when drafting suppression motions rather than arguing that the
4 affidavit was based on inaccurate information. In sum, Petitioner argues that the Court
5 wrongly found that the search warrant was valid and that his attorneys were ineffective
6 for failing to use an audio recording of the March 9, 2010 interview to prove otherwise.

7 The Court has already addressed whether the warrant was based upon probable
8 cause. As found at Petitioner's pretrial suppression hearing and as affirmed on appeal, the
9 search warrant for the storage unit was based on probable cause. *See* CR11-5566, Dkt.
10 192 at 135–40; *Id.*, Dkt. 197 at 123–24; *Id.*, Dkt. 229. Also, Petitioner's allegation that
11 his counsel relied upon a written transcript rather than an actual audio recording does not
12 state any objectively deficient performance that could constitute ineffective assistance of
13 counsel. Accordingly, the Court finds no error on Petitioner's fifth and sixth grounds.

14 III. ORDER

15 Therefore, it is hereby **ORDERED** that the petition to vacate, set aside, or correct
16 sentence pursuant to 28 U.S.C. § 2255 (Dkt. 1) is **DENIED**. The Government's motion to
17 seal (Dkt. 11) is **GRANTED**.

18 Dated this 6th day of December, 2016.

19
20 

21 BENJAMIN H. SETTLE
22 United States District Judge